Supreme Court, U.S.
FILED

NO. 95-444 MAY 3 - 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

STEVEN M. ASKIN,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR BY DENYING YOUR APPELLANT'S MOTION TO SUPPRESS AND SUBSEQUENTLY HOLDING YOUR APPELLANT IN CONTEMPT WHERE APPELLANT HAD JUST CAUSE TO REFUSE TO COMPLY WITH THE DISTRICT COURT'S ORDER WHERE THE QUESTIONS PROPOUNDED TO THE APPELLANT BY THE GOVERNMENT WERE BASED UPON TELEPHONE CONVERSATIONS THAT WERE INTERCEPTED AND RECORDED BY THE GOVERNMENT, IN VIOLATION OF YOUR APPELLANT'S 4TH AMENDMENT RIGHT TO PRIVACY.

II. WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR BY HOLDING THE APPELLANT IN CIVIL CONTEMPT, PURSUANT TO TITLE 28 U.S.C. SECTION 1826(a) WHERE YOUR APPELLANT'S REFUSAL TO COMPLY WITH THE DISTRICT COURT'S ORDER WAS BASED UPON "JUST CAUSE."

PARTIES TO THE PROCEEDING

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OPINIONS BELOW

On February 2, 1995, the United States Court of Appeals for the Fourth Circuit in the case of In Re Askin, 47 F.3d 100 (4th Cir. 1995), affirmed by published opinion (S.Ct. App. p.1), your Petitioner's citation for civil contempt

in the United States District Court for the Northern District of West Virginia.

Your Petitioner, Steven M. Askin, received a subpoena on April 7, 1994, to appear as a witness on behalf of the United States Government in the matter of United States of America v. Mark T. McNulty, et al, Criminal Action No. 94-00008, on the 18th day of May, 1994, at 8:30 a.m. Prior to being subpoenaed by the Government, your Petitioner was disqualified by the Honorable David Core, United States Magistrate Judge, from representing Defendants Robin L. Brumbaugh and Paul Frazier in the aforementioned criminal matter. Thereafter, Petitioner filed a Motion to Inspect and Examine Intercepted Communications and/or Evidence Therefrom

and/or Suppress and a Motion to Quash Subpoena. However, your Petitioner's Motions were denied by the Honorable Irene Keeley, United States District Judge, on May 17, 1994. Petitioner's Renewed Motion to Examine Intercepted Communications and/or Evidence Therefrom and/or Suppress was also denied by the District Court.

On May 23, 1994, your Petitioner was called by the United States as a witness in its case in chief. However, on the advice of his counsel, your Petitioner refused to testify on the basis that the questions propounded to him by the Government were in violation of Petitioner's 4th Amendment right to privacy and that any relinquishment of that right by answering questions would

necessarily render the assertion of the privilege moot. Consequently, the District Court found the Petitioner to be in civil contempt, in violation of Title 28 U.S.C. § 1826. After informing the Court that he intended to appeal the finding of civil contempt and the issues raised in his Motion to Suppress to the 4th Circuit, the District Court released the Petitioner to bail, pursuant to Title 28 U.S.C. § 1826(b). On May 31, 1994, your Petitioner filed a Notice of Appeal in the Fourth Circuit.

JURISDICTION

Petitioner claims jurisdiction pursuant to Rule 10.1(a) of the Rules of the United States Supreme Court. A judgement was entered in the United States Court of Appeals for the Fourth

Circuit in this matter on February 2, 1995.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Fourth Amendment to the United States Constitution

Title 18 U.S.C. Section 2510 et seq.

Title 18 U.S.C. Section 2515

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STATEMENT OF THE CASE

On the 13th day of January, 1994, a 102-count indictment was returned against the Defendants enumerated in Mark T. McNulty, et al, Criminal Action No. 94-00008. Prior to the indictment in Mark T. McNulty, et al, the Government performed both audio and visual

surveillance of Defendant Robin L. Brumbaugh's residence, located in Martinsburg, West Virginia. Utilizing a scanning device, Government agents intercepted and recorded phone conversations made from and received at Brumbaugh's residence on a cordless telephone. Prior to monitoring the cordless telephone conversations, the Government did not obtain a wiretap order, relying upon Title 18 U.S.C. § 2510(1), which states that the radio portion of a cordless telephone communication is not protected by the Electronic Communications Privacy Act of 1986.

On February 22, 1994, your Petitioner was disqualified from representing Defendants Robin L.

Brumbaugh and Paul Frazier in Mark T. McNulty, et al, by the Honorable David Core, United States Magistrate Judge. Thereafter, on April 7, 1994, your Petitioner received a subpoena requiring him to appear as a witness on behalf of the United States Government during the trial of United States v. Mark T. McNulty, et al. On May 6, 1994, Petitioner filed a Motion to Inspect and Examine Intercepted Communications and/or Evidence Derived Therefrom and/or Suppress after being informed by the Government that conversations were intercepted from Defendant Robin L. Brumbaugh's residence containing your Petitioner's voice. Petitioner also filed a Motion to Quash Subpoena on May 11, 1994. However, both of Petitioner's

motions were denied by the Honorable Irene Keeley, United States District Judge.

Petitioner filed a Renewed Motion to Suppress on May 19, 1994, setting forth that telephone calls made from the Petitioner's cellular and land-based telephones were intercepted by the Government in violation of the Petitioner's Fourth Amendment rights. Petitioner contended that his position was factually distinct from the other parties because Petitioner was an innocent third party who made calls utilizing either a traditional wire-based telephone or a cellular telephone, both of which are afforded protection under the Electronic Communications Privacy Act of 1986. In reviewing your Petitioner's

motion, the District Court granted your Petitioner standing, but held that the Electronic Communications Privacy Act was not implicated by Petitioner's arguments. In denying Petitioner's Motion to Suppress, the Court further stated that,

> "I appreciate that this is an unchartered territory in the law and that the policy arguments, particularly as to the Constitutional aspects of this, if actually presented in an appropriate fashion could be very persuasive. I don't believe those facts exist here, based on the testimony and evidence that I have received and certainly not in connection with Mr. Askin's posture here this afternoon."

(Tr. excerpt p.21; 5/19/94).

On May 23, 1994, your Petitioner was called by the United States as a witness in its case in chief. However, on the advice of his counsel, your Petitioner refused to testify on the basis that the

questions to be propounded to him by the Government were in violation of Petitioner's Fourth Amendment right to privacy and that any relinquishment of that right by answering questions would necessarily render the assertion of the privilege moot. Consequently, the District Court found the Petitioner to be in civil contempt, in violation of Title 28 U.S.C. § 1826. After informing the District Court that he intended to appeal the finding of civil contempt based upon the issues raised in his Motion to Suppress to the Fourth Circuit, the District Court released the Petitioner to bail, pursuant to Title 28 U.S.C. § 1826(b). On May 31, 1994, your Petitioner filed a Notice of Appeal in the Fourth Circuit. Although the United

States motioned to dismiss both of the Petitioner's appeals, No. 94-5428 and no. 94-5384, such motion was denied as to appeal No. 94-5428, but granted as to appeal No. 94-5384 on the basis that your Petitioner had no objection to such motion.

Thereafter, your Petitioner appealed his civil contempt citation to the United States Court of Appeals for the Fourth Circuit. However, on February 2, 1995, the Fourth Circuit affirmed your Petitioner's civil contempt citation.[1]

[1] Prior to the Fourth Circuit's decision in this matter, Petitioner was named in a two-count indictment returned by a Federal Grand Jury in the Northern District of West Virginia. Count one of the indictment alleged that the eighth overt act of the conspiracy count was Petitioner's civil contempt citation. Count two charged Petitioner with criminal contempt stemming from the civil contempt citation as well.

[See In Re Askin, 47 F.3d 100 (4th Cir. 1995).] Petitioner now brings this petition for Writ of Certiorari.

ARGUMENTS

ARGUMENT I

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR BY DENYING YOUR PETITIONER'S MOTION TO SUPPRESS AND SUBSEQUENTLY HOLDING YOUR PETITIONER IN CONTEMPT WHERE PETITIONER HAD JUST CAUSE TO REFUSE TO COMPLY WITH THE DISTRICT COURT'S ORDER WHERE THE QUESTIONS PROPOUNDED TO THE PETITIONER BY THE GOVERNMENT WERE BASED UPON TELEPHONE CONVERSATIONS THAT WERE INTERCEPTED AND RECORDED BY THE GOVERNMENT, IN VIOLATION OF YOUR PETITIONER'S 4TH AMENDMENT RIGHT TO PRIVACY.

Petitioner submits that the 1994 amendments to Title 18 U.S.C. § 2510 affording protection to cordless telephones indicate that the legislative branch has recognized that the Electronic

Communications Privacy Act of 1986 unfairly allowed Federal and State Law Enforcement Agencies as well as private parties to violate unsuspecting citizens' privacy rights by intercepting cordless telephone communications without a wiretap. Consequently, Petitioner submits that the 1994 amendments to Title 18 U.S.C. § 2510 clearly indicate a legislative intent to provide all parties, no matter what form of telephonic communications they utilize, the right to avoid unlawful interception of their phone conversations.

Petitioner submits that the District Court was clearly erroneous in refusing to grant Petitioner's Motion to Suppress based upon the government's violation of Petitioner's Fourth Amendment right to

privacy thereby disregarding Petitioner's just cause and subsequently holding Petitioner in civil contempt. Your Petitioner contended in his renewed suppression motion that, pursuant to Title 18 U.S.C. § 2518(10)(a) he was an aggrieved party to the proceeding and therefore had standing on the grounds that the telephone communications in question were unlawfully intercepted by the Government. Title 18 U.S.C. § 2518(10)(a) sets forth that,

> "any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a state, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that

(i) the communication was unlawfully intercepted."

While recognizing that the Petitioner had standing, the District Court nevertheless concluded that the interception of your Petitioner's phone conversations was not unlawful because such conversations were obtained by monitoring a cordless telephone, which was not protected under the Electronic Communications Privacy Act of 1986. See Title 18 U.S.C. § 2510(1) [1986].

Initially, it is quite clear that Petitioner's status as an innocent third party caller is factually distinct from all of the named Defendants in United States v. Mark T. McNulty, et al. Although the named Defendants' assertion of their Fourth Amendment Rights was contingent upon the protections afforded

to a cordless telephone as defined in 18 U.S.C. § 2510(1), Petitioner's assertion of his Fourth Amendment Rights is based upon Petitioner's use of a cellular or wire-based telephone which are set forth in 18 U.S.C. § 2510(12) as telephone transmissions that are protected under the Electronic Communications Privacy Act as well as the Fourth Amendment.

Petitioner submits that the three most recent federal cases addressing whether or not cordless telephone communications are protected are all factually distinguishable from Petitioner's status as an innocent third party calling from a protected class of telephone. For example, United States v. Smith, 978 F.2d 171 (5th Cir. 1992), involved a situation where the Defendant,

Smith, contended that the interception of his cordless telephone conversations violated both Title III of the Omnibus Crime and Control and Safe Streets Act of 1968 (Title III, 18 U.S.C. §§ 2510-2521) and the Fourth Amendment. The Fifth Circuit set forth that:

> "The legal standard that Smith must satisfy in order to show a Fourth Amendment violation is well established. First, he must show that a government activity intruded upon a reasonable expectation of privacy in such a significant way that the activity can be called a "search". Second, if a search has in fact occurred, Smith must show that the government intrusion was unreasonable given the particular facts of the case."

Id., at 176. The Court further indicated that "[t]he expectation of privacy must be one that society is prepared to recognize as reasonable." Id., at 177.

Holding that Title III does not apply to intercepted cordless phone conversations and also that Smith failed to carry his burden of showing that the evidence against him was obtained in violation of his Fourth Amendment Rights, the Court affirmed his conviction. However, no analysis or mention was given to the Fourth Amendment protections afforded to an innocent third party utilizing a protected type of telephone who unknowingly called a party utilizing an unprotected cordless telephone. Petitioner submits that the cellular and wire-based telephones he utilized are protected under the Electronic Communications Privacy Act of 1986, and as a result, Petitioner clearly has a

reasonable expectation of privacy in the phone calls he made.

Similarly distinguishable from Petitioner's position are Tyler v. Berod, 877 F.2d 705 (8th Cir. 1989) and United States v. Carr, 805 F.Supp. 1266 (E.D.N.C. 1992). In Tyler, supra., the Defendant's neighbors recorded conversations of the Defendant speaking on his cordless telephone in his household. Such tapes were later turned over to law enforcement officials and were the basis of criminal charges later filed against the Defendant. Reasoning that the Defendants did not have a justifiable expectation of privacy in their conversations, the Court refused to entertain the Defendant's civil claim. In Carr, supra., the Defendant's motioned

to suppress the recording of telephone conversations made at their residence on a cordless telephone. The District Court denied the Defendant's motion pursuant to 18 U.S.C. § 2510(1) which specifically excludes the radio portion of a cordless telephone communication.

Petitioner submits that the three aforementioned cases clearly address the rights of a party utilizing a cordless telephone when making or receiving a phone call. However, they do not address or consider the rights of an innocent third party making a phone call from either a wire based or a cellular telephone, to someone who unbeknownst to the caller is utilizing a cordless phone which is afforded no protection under the

Electronic Communications Privacy Act of 1986.

Not only is such argument not addressed by the three aforementioned cases but the provisions of the Electronic Communications Privacy Act itself also fail to address your Petitioner's position that the person on the other end of a cordless conversation deserves Fourth Amendment privacy protection. For example, the House Committee Report discussing Pre-Electronic Communications Privacy Act Law refers to this problem:

> "cordless telephones are another new telephone technology presenting a conflict between communication and interception. A cordless telephone consists of a handset and a base unit wired to a land line and a household/business electrical current. A communication is transmitted

from the handset to the base unit by AM or FM radio signals. From the base unit the communication is transmitted over wire, the same as a regular telephone call. The radio portions of these telephone calls can be intercepted with relative ease using standard AM radios.

The legality of intercepting cordless telephone calls has been fully litigated in only two states. The Supreme Courts of Kansas and Rhode Island, both construing Federal law, have held that evidence obtained by an interception of a cordless telephone call by law enforcement officials without a warrant can be admitted at trial. In each case the Court was convinced that the radio portion of a conversation was entitled to no legal protection against interception. This approach sharply conflicts with the major relevant Federal case. [United States v. Hall, 488 F.2d 193 (9th Cir. 1973)]

These courts were not required, however, to decide the rights of the other party to the conversations in these cases, persons using conventional land

> line telephones. While it is possible to argue that a person using a cordless phone knows or has reason to know that the call can be easily overheard, that argument does not apply to the other party to the conversation.

H.R. Rep. No. 647, 99th Cong., 2d Sess. 21 (1986). The House Report further sets forth that,

> "by 'cordless telephone' we refer not to a cellular telephone, but to the type of telephone which uses a short-range (a few hundred feet) radio link between the handset and the base unit in place of the usual wire. Such telephones are regulated under part 15, subpart E of the Rules of the Federal Communications Commission (FCC), and are not licensed. Because the communications made on some cordless telephones can easily be intercepted with readily available technologies (such as AM radio), it would be inappropriate to make such interception a criminal offense. The absence of privacy protection has been noted by the FCC. 47 C.F.R. §

> 15.236(a) (requiring a label stating 'privacy of communications may not be insured when using this phone'). This view also comports with some recent cases. See Discussion of Current Law, supra. It should be noted that it is only the radio portion of the communication that is excluded. The wire portion of the communication remains fully covered in the same sense as a traditional wire telephone conversation.

H.R. Rep. No. 647, 99th Cong., 2d Sess. 33 (1986). The Senate Report reached a similar conclusion:

> "subparagraph (D) specifies that the term 'wire communication' does not include the radio portion of a cordless telephone communication transmitted between the cordless handset and the base unit. Because communications made on some cordless telephones can be intercepted easily with readily available technologies, such as an AM radio, it would be inappropriate to make the interception of such

> communication a criminal offense. The wire portion of a cordless communication remains fully covered, however.

S. Rep. No. 99-541, 2d Sess. 12 (1986). Unfortunately, the legislative history of the Electronic Communications Privacy Act of 1986 fails to set forth beyond the few sentences contained within the House Report whether or not Congress considered the rights of the other party to a cordless telephone conversation. Nevertheless, the legislative history of the act clearly recognizes that both wire-based telephone communications as well as cellular telephone communications are protected under the Electronic Communications Privacy Act of 1986. Therefore, it is your Petitioner's contention that his 4th Amendment right to privacy would apply to the calls made

by your Petitioner on either a wire-based telephone or a cellular telephone and not be vitiated by the fact that the person whom he called, Defendant Robin L. Brumbaugh, utilized a cordless telephone.

Although your Petitioner was unable to find any Federal case law addressing the issue raised herein, there are three state opinions considering the issue raised herein. In State v. McVeigh, 620 A.2d 133 (Conn. 1993), the Connecticut Supreme Court considered whether or not communications over the Defendants' cordless telephone were wire communications within the meaning of the Connecticut Wire Tap Act. Although the Connecticut Wire Tap Act defines wire communications more expansively than does 18 U.S.C. § 2510(1) and does not include

a provision explicitly excluding cordless telephone communications from the definition of wire communications, the Court stated that:

> "...reading the Wire Tap Act so as to exclude from its scope conversations over cordless telephones would necessarily exclude from its scope the statutory protections afforded by the Act to innocent third parties who are at the other end of the conversations and who may have no way of knowing that, although they are speaking over traditional wire telephones, their conversations are unprotected."

The Florida Supreme Court recently affirmed a 1994 decision of the Fourth District Court of Appeals of Florida that cordless telephone conversations were unlawfully intercepted. See State v. Mozo, _____ S.2d _____, 20 Fla.L. Weekly S161, 1995 WL 215031 (Fla. S.Ct. 1995). Id., at 142. More importantly,

the Florida Supreme Court recognized that "...[t]he actual 'interception' of the communication occurs not where such is ultimately heard or recorded, but where the communication originates." Slip opinion, p. 2 [see also, United States v. Nelson, 837 F.2d, 1527 (11th Cir. 1988), cert. denied, 488 U.S. 829 (1988)].

In the original Mozo v. State, 632 So.2d 623 (Fla. App. 4 Dist. 1994), the Court concluded that, ". . . a person's private conversations over a cordless telephone are presumptively protected from Government interception." Id., at 635. The Court further reasoned that,

> ". . . ordinary phone conversations are clearly protected under both the Florida and Federal Constitutions. A cordless phone looks like and is operated the same as an ordinary phone. And, except

> for the radio signals from the handset to the base, a cordless phone works like an ordinary phone in a technical sense. Indeed, with the change in technology, cordless phones are now nearly as secure as traditional phones. In terms of Government intrusion, for example, it would appear irrational to punish those who purchased a 'first generation' cordless phone, more easily intercepted, compared to recent purchasers of more secure phones, especially when the appearance of all cordless phones is similar."

Id. More importantly, the Florida court addressed the problems that would occur in a case similar to your Petitioner's situation.

> "a contrary holding would leave numerous other troubling questions: what happens to a person who calls from a wire-based phone to another person who receives or transfers the call to a cordless phone? What about the person who is a guest at a home who is offered a cordless phone to make a private call? Does the right

> of privacy come and go in such a haphazard fashion? Indeed, one can envision an Orwellian scene of a husband looking out the window and saying to his wife: 'you can make your call now, Lois, the police scanner has just driven away.'"

Id., Footnote 10. Petitioner submits that the same analysis should apply to the wire-based and cellular phone calls made by him to the named Defendants' residence where such calls were answered by an arguably unprotected cordless telephone and in turn to calls made from an arguably unprotected cordless telephone to the Petitioner who answered and spoke on a cellular or land based telephone.

Petitioner would further direct the court to State v. Bidinost, 644 N.E.2d 318 (Ohio 1994), wherein the Ohio Supreme Court concluded in applying the Ohio

Wiretap Statute that cordless telephone communications are protected from unlawful interception pursuant to the Ohio Wiretap Statute. The court also set forth that

> "additionally, appellant correctly recognizes that cordless telephone conversations also fit the statutory definition of 'wire communication.' The evidence at the suppression hearing indicated that when a telephone call is made from a cordless telephone, the outgoing communications travel from the handset to the base unit via radiowaves. From there, the communication travels through the telephone lines. Although no evidence was presented at the hearing regarding incoming communications, the same physical principles apply. See, generally, State v. McVeigh (1993), 224 Conn. 593, 598, 599, 620 A.2d 133, 136. Namely, if a call is made to a home serviced by a cordless telephone, and the cordless phone is used to receive the call, the incoming message travels through the telephone

> lines to the cordless telephone base unit. From the base unit, the incoming messages are transmitted to the handset via radiowaves. Thus, incoming and outgoing communications on cordless telephones are made, in part, through the use of the facilities for the transmission of communications through the aid of wires connecting the point of origin of the communication to the point of reception. Therefore, radiowave portions of cordless telephone communications are also 'wire communications' as defined in R.C. 2933.51 (A)."

Id., at 327, 328. The Ohio Supreme Court in recognizing that its decision was contrary to that of numerous other jurisdictions including the federal jurisdictions which had rendered a ruling on this matter set forth that "...[i]n any event, we seriously question the proposition that people communicating on cordless telephones have no legitimate expectation of privacy. Fundamental

rights should not be sacrificed on the alter of advancing technology." Id., at 328, 329. Your Petitioner submits that the same determination should be made by this Court. It is clear that with the 1994 amendment to Title 18, U.S.C. § 2510(1) Congress has also recognized the flaws in the 1986 amendment to Title 18 U.S.C. § 2510, et seq. Specifically, the portion not affording protection to cordless telephone communications needed to be corrected so as to protect the privacy interests of the citizens of the United States.

Petitioner would also submit that the Fourth Circuit's discussion of whether or not the Petitioner should be afforded ex post facto protection based upon the 1994 amendments to the wire tap

statute suggests that notwithstanding the fact that Congress later amended the wire tap statute to afford full protection to cordless telephones, the Fourth Circuit is unwilling to recognize the flaws in the 1986 amendment to the wiretap statute. Nevertheless, Congress recently recognized such flaws as evidenced by the 1994 amendments to the wiretap statute. See Pub. L. No. 103-414 §202, 108 Stat. 4279 (1994). Furthermore, the Fourth Circuit's discussion seems to suggest that were it to bifurcate this issue and address it solely from Petitioner's perspective of his utilizing a protected cellular or wire base telephone, that a deluge of problems would occur. Petitioner submits that is clearly not the case as to Petitioner's knowledge,

the argument that he raised to the Fourth Circuit as well as subsequently to this Court is a matter of first impression. Petitioner thus submits that it was inappropriate for the Fourth Circuit to fail to address the issues in Petitioner's argument by simply suggesting that the problems of ex post facto application of the Fourth Circuit's decision would unfairly penalize people who could not appreciate their conduct ex ante.

Also, Petitioner submits that the Fourth Circuit clearly mischaracterized the 1986 amendment to the wire tap statute as "a carefully considered decision of a co-equal and representative branch of our Government." Id. at 105. The Fourth Circuit in deferring to the

Legislative Branch in promulgating and developing the 1986 amendment to Title 18 U.S.C. § 2510, seems to opt out of making the hard decision that the 1986 amendment to the wire tap statute which failed to afford privacy protections to cordless telephone users was bad law and needed to be corrected and remedied. This fact is evidenced by the 1994 amendment by Congress. See Pub. L. No. 103-414 §202, 108 Stat. 4279.

Therefore, Petitioner would ask this Court to find that when he utilized a protected telephone, pursuant to the 1986 wire tap statute, that his right to privacy should not be unknowingly waived merely by speaking to a third party who he is unaware is utilizing a cordless telephone and further which is being

monitored by the agents of the United States Government.

Finally, your Petitioner submits that, pursuant to the tests enumerated in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967), your Petitioner had a reasonable expectation of privacy in the phone calls he made utilizing both a wire-based and a cellular telephone, as both are protected by the Electronic Communications Privacy Act of 1986. Furthermore, the 1994 amendments to Title 18 U.S.C. § 2510 indicate that society is prepared to recognize that regardless of what type of telephone is utilized by a person, their expectation of privacy is reasonable. Therefore, Petitioner submits that the District Court was clearly erroneous in denying your

Petitioner's Motion to Suppress and subsequently holding your Petitioner in civil contempt, pursuant to Title 28 U.S.C. § 1826(a), where Petitioner believed in good faith that he had just cause to refuse to comply with the District Court's order based upon the government's violation of his Fourth Amendment right to privacy.

ARGUMENT II

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR BY HOLDING THE APPELLANT IN CIVIL CONTEMPT, PURSUANT TO TITLE 28 U.S.C. SECTION 1826(a) WHERE YOUR PETITIONER'S REFUSAL TO COMPLY WITH THE DISTRICT COURT'S ORDER WAS BASED UPON "JUST CAUSE."

Your Petitioner submits that the District Court abused its discretion by holding your Petitioner in civil contempt, pursuant to Title 28 U.S.C. §

1826(a) on the basis that Petitioner refused to answer the questions propounded to him by the United States Government, which were based upon telephone conversations seized in violation of Petitioner's Fourth Amendment right to privacy. Your Petitioner submits that the ground upon which he refused to answer such questions, the violation of his 4th Amendment rights, constitutes "just cause", pursuant to Title 28 U.S.C. § 1826(a) and consequently, the District Court should not have held your Petitioner in Civil contempt.

Title 28 U.S.C. § 1826(a), recalcitrant witnesses, sets forth that:

> "whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses

> without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information."

Thus, when a witness sets forth just cause in refusing to testify or provide other information, the witness should not be adjudged to be in contempt. During the direct examination of your Petitioner, the following colloquy occurred:

Mr. Mucklow:

Mr. Askin, do you know a Mark McNulty?

Mr. Askin:

Your Honor, my counsel told me it would be appropriate for me to raise objections

on my own instead of my counsel doing it, to the questions I am going to object to or assert privileges. So, with respect to the Court, I would ask, is this the appropriate time for me to that?

The Court:

Are you raising it in response to the question...?

Mr. Askin:

I am, Your Honor, but there is also another assertion I would like to make which has to do with my 4th Amendment rights which I believe my counsel, outside my presence, argued to the Court last week, that my conversations were intercepted by agents of the United States Government or task force members, while I was using a protected phone. And it is my understanding from the cases that I have been informed have been argued to the Court that I have a legitimate 4th Amendment right and I have been advised by my counsel, Mr. Mills, that if I want to continue to invoke that right and regardless of Your Honor, and respectfully so, disagree with the Court's ruling and seek review of the 4th Circuit, I cannot respond to questions that would, in fact, disclose the very information about which I am raising the objection.

So it is not really an ethical issue between client and counsel. It is the

fact that at this point, it is my understanding Mr. Mucklow is going to ask me questions that may very well involve my responding and providing information that is derivative or directly received or obtained by the Government regarding conversations made of which I was a party, I was using a protected phone, either a land-based or cellular, although the other party may have been using a non-protected phone.

That would be the objection I will raise to any question based on the information or the advice Mr. Mills gave me, that if I do not raise the objection appropriately at this time that I may waive it, and I believe that this would be the appropriate time to do that, with respect to the Court.

The Court:

So are you refusing to answer the question, do you know Mark McNulty?

Mr. Askin:

Yes, Your Honor.

The Court:

All right. Now, Mr. Askin, this Court has entered an order on the request of the motion of the United States which compels your testimony based on the immunity that the Government has provided to you.

I assume that you are not asserting any privilege to the immunized testimony, but rather you are here asserting a 4th Amendment right, as well as your ethical obligation that you owe not to disclose whether you know Mr. McNulty?

Mr. Askin:

That would be correct, Your Honor. The 4th Amendment that I am basing it on, I don't believe that order that I read even addressed the 4th Amendment.

The Court:

No, that does not, but I have already ruled on the 4th Amendment issue, Mr. Askin; therefore, you do not have the right to decline to answer based on the 4th Amendment here.

Moreover, this Court finds as a matter of law that the question, do you know Mark McNulty, does not, on the face of it, implicate any right or privilege that you would have as a lawyer, and I am going to order you to answer that question.

Mr. Askin:

Well, on the advise of counsel, Your Honor, I respectfully decline to answer on the 4th Amendment right, and I would ask that if, in fact, the Court is going to direct me to answer an particular question that I then have the opportunity to have counsel at my side to consult

with him about whether a particular question does or does not truly implicate that right. But if I don't have that opportunity, then I am going to initiate this time. I do it with respect for the Court. I apologize if it's disruptive, but it is on the advise of counsel.

The Court:

Your counsel has already been advised that he has the right to consult with you and to advise you during this hearing.

Mr. Mills, you may approach.

Mr. Askin:

Your Honor, having consulted with counsel, I would again invoke the 4th Amendment right to decline to answer the question.

The Court:

Mr. Mucklow?

Mr. Mucklow:

Your Honor, I could go on and ask another question and see what happens or move to make a motion by the United States to hold Mr. Askin in contempt for violating the Court's order.

The Court:

Before you make that motion, please inquire further.

Mr. Mucklow:

Mr. Askin, do you know Robin L. Brumbaugh?

Mr. Askin:

Your Honor, again, I assert the same privilege and decline to answer.

Mr. Mucklow:

Do you Mark Dabbs?

Mr. Askin:

With Mark Dabbs, Your Honor, I would decline to answer on both the attorney-client privilege, as well as the 4th Amendment privilege I believe I am entitled to assert.

Mr. Mucklow:

Mr. Askin, have you used cocaine?

Mr. Askin:

I would answer the questions the same way, whether it has to do with cocaine or individuals.

The Court:

Mr. Askin, the Court will warn you again. Your answer to that question is compelled by virtue of the grant of immunity that has been provided from the Attorney General of the United States.

Mr. Askin:

I understand that, Your Honor. On advise of counsel, to assert my 4th Amendment rights, I will not answer.

Mr. Mucklow:

Mr. Askin, have you ever received cocaine, either by purchase or gift or in any other way, cocaine from Mark McNulty?

Mr. Askin:

I am going to answer the same, asserting the 4th Amendment rights.

The Court:

Mr. Mills, I want to make sure I understand this clearly on the record.

The response to the question, do you know Mark McNulty, in your opinion, implicates some 4th Amendment right of Mr. Askin; is that your position?

Mr. Mills:

Well, Your Honor, we

The Court:

Yes or no, Mr. Mills.

Mr. Mills:

Yes, it is, Your Honor, to the extent

The Court:

All right. Fine. The question, do you know Robin L. Brumbaugh, implicates Mr. Askin's 4th Amendment right; yes or no?

Mr. Mills:

Let me qualify my previous answer.

The Court:

You may as soon as you answer my question, Mr. Mills.

Mr. Mills:

It may perhaps.

The Court:

It may perhaps. All right.

Mr. Mills:

That's my answer to the first question as well.

The Court:

And the reason for that is what?

Mr. Mills:

Well, Your Honor, he has asserted through a motion, and the Court has heard it and denied that motion, he has asserted that the information that was garnered through the wire intercepts or the radio frequency that came from a protected, cellular or land-based phone was seized from him in violation of his 4th Amendment right, and the statutory prohibition on seizing them that way.

If that is true, if the Fourth Circuit were to adopt that position, and I think that we have acknowledged that there is really no case law addressing that particular issue of someone calling in, an innocent third party; if that is true, then we would necessarily need to inquire of the Government how they have propounded the questions which they are seeking now to interrogate Mr. Askin on the witness stand.

If they obtained those questions or any information regarding the alleged cocaine use or anything else, any other allegation they intend to put forward here today, as a result directly or indirectly of those what would then be illegally obtained voice transmissions, then it would be improper for them to ask the questions of Mr. Askin based upon that.

And, that, Your Honor, is the Kastigar issue in U.S. v. North that I am

presenting to the Court, and I have advised Mr. Askin that if he answers those question, he may well waive that right with the 4th Circuit. That has been my advise. (Tr. excerpt pp. 20-30, 5/23/94).

As evidenced by the transcript excerpt, your Petitioner asserted that his 4th Amendment right to privacy had been violated by the Government's interception of his telephone conversations made from and received on either a wire-based or cellular telephone, which are protected by the Electronic Communications Privacy Act of 1986. It is clear that Petitioner took every reasonable step and precaution to prudently advise the District Court of his objections to being called as a witness as well as the legal grounds supporting those objections. Petitioner was not advised of the government agents'

utilization of a scanner to obtain protected phone conversations until the first day of the trial and promptly filed a written objection. Petitioner submits that the violation of his Fourth Amendment right to privacy by the Government constitutes just cause, thereby justifying Petitioner's refusal to answer the questions propounded to him by the United States Government.

Title 18 U.S.C. § 2515 sets forth that,

> "whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision

> thereof if the disclosure of that information would be in violation of this chapter."

In Gelbard v. United States, 408 U.S. 41, 92 S.Ct. 2357 (1972), this court upheld a grand jury witness' right to refuse to testify on the ground that his questioning would be based on information gained through an illegal wiretap in violation of Title 18 U.S.C. § 2510. This court held that the witness' refusal to testify constituted "just cause" for a failure to comply with the court's order to testify and therefore was also a defense to a civil contempt proceeding under Title 28 U.S.C. § 1826(a). The court reasoned that,

> "contrary to the Government's assertion that the invasion of privacy is over and done with, to compel the testimony of these witnesses compounds the statutory prescribed invasion

> of their privacy by adding to the injury of the interception the insult of compelled disclosure. And, of course, Title III makes illegal not only unauthorized interceptions but also the disclosure and use of information obtained through such interceptions. . . . hence, if the prohibition of § 2510 is not available as a defense to the contempt charge, disclosure through compelled testimony makes the witness a victim, once again, of a federal crime."

Id., at 2363. Petitioner submits that, pursuant to this court's analysis in Gelbard v. United States, supra, his refusal to answer questions by the Government, which were the subject of phone conversations obtained by the Government in violation of Petitioner's Fourth Amendment privacy rights, constitutes just cause and is a valid defense to Petitioner's civil contempt adjudication by the District Court.

Justice Douglas' concurring opinion in Gelbard v. United States, supra, also supports your Petitioner's position.

> "although I join in the opinion of the Court, I believe that, independently of any statutory refuge which Congress may choose to provide, the 4th Amendment shields a grand jury witness from any question (or any subpoena) which is based upon information garnered from searches which invade his own constitutionally protected privacy."

Id., at 2368.

Various Circuit Courts have also recognized that a showing by a witness that the questioning of such witness is based upon information acquired during illegal electronic surveillance by the Government constitutes "just cause" for refusing to testify and precludes a finding of contempt by the District Court, pursuant to Title 28 U.S.C. §

1826(a). See Grand Jury v. Gassiraro, 918 F.2d 1013, Footnote 1 1014 (1st Cir. 1990); In Re Grand Jury Proceedings, 786 F.2d 3, 7 (1st Cir. 1986); In Re Grand Jury Proceedings, 613 F.2d 1171 (D.C. Cir. 1979). In United States v. O'Day, 667 F.2d 430 (4th Cir. 1981), the court refused to find that the Petitioner had just cause to refuse to testify before the grand jury on the basis that the Petitioner's discovery ". . . of a disconnected electronic eavesdropping device outside of his residence, lying on the ground in the vicinity of a telephone junction box" was insufficient to show that the Government had conducted illegal electronic surveillance of the Petitioner's residence. Id., at 432. Petitioner submits that his case is

clearly distinguishable from United States v. O'Day, supra, because the Government did conduct illegal electronic surveillance of your Petitioner's phone conversations which were made from and received on either wire-based or cellular telephones which are protected under the Electronic Communications Privacy Act of 1986. Consequently, the Government's failure to obtain a wiretap order, pursuant to Title 18 U.S.C. § 2516 warrants a conclusion that the Government's monitoring of conversations containing your Petitioner's voice was illegal and an invasion of your Petitioner's Fourth Amendment right to privacy.

Also, contrary to the argument of the United States, your Petitioner

submits that his appeal of the United States District Court's citation of him for civil contempt is not moot. In Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986), the court set forth that:

> "Two exceptions to the mootness doctrine have evolved: (1) 'collateral consequences'; and (2) 'capable of repetition, yet evading review.' ...the 'collateral consequences' exception was enunciated in Carafas, 391 U.S. 234, 88 S.Ct. 1566. The Court held that where a conviction results in collateral consequences sufficient to create 'a substantial stake in the...conviction which survives the satisfaction of the sentence,'" the habeas claim is not moot (citations omitted)."

Id., at 842. See also, Nakell v. Attorney General of North Carolina, 15 F.3d 319, 322 (4th Cir. 1994). Petitioner submits that pursuant to Rule 8.4(d) of the West Virginia Rules of Professional Conduct,

his refusal to testify on behalf of the United States in the matter of United States of America v. Mark T. McNulty, et al., Criminal Action Number 94-00008 and consequently being held in civil contempt and later charged with criminal contempt could be construed as "engag[ing] in conduct that is prejudicial to the administration of justice" by the West Virginia State Bar Committee. Thus, pending the outcome of the Petitioner's appeal, he may be subject to disciplinary action by the West Virginia State Bar Committee.

In Nakell v. Attorney General of North Carolina, supra., a situation similar to your Petitioner's case arose. Mr. Nakell, a North Carolina Attorney, was convicted of criminal contempt in a

North Carolina State Court and sentenced to ten days in jail and a $500 fine. After exhausting all of his State Court remedies, Mr. Nakell filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of North Carolina. The North Carolina Attorney General offered an argument similar to that of the United States offered in your Petitioner's case contending that Mr. Nakell's unconditional release from jail rendered the issues raised in his habeas corpus petition moot. Like your Petitioner, Mr. Nakell contended that since he was an attorney, he was subject to "...possible disciplinary proceedings as a result of his contempt conviction." Id., at 323. The court held that "[b]ecause of the

collateral consequences associated with Nakell's conviction his appeal is not moot." Id., at 323. See also Richmond Black Police Officer's Association v. Richmond, 548 F.2d 123, 129 (4th Cir. 1977); In re. Kave, 760 F.2d 343, 353 note 20 (1st Cir. 1985).

Finally, throughout the trial of United States v. Mark T. McNulty, et al, Petitioner took steps to prevent disruption of the court and only refused to testify on the basis of a good faith reliance upon an area of the law that is unchartered. Even Judge Keeley recognized that,

> ". . . this is an unchartered territory in the law and that the policy arguments, particularly as to the Constitutional aspects of this, if actually presented in an appropriate fashion could be very persuasive."

(Tr. excerpt, p.21, 5/19/94). Therefore, your Petitioner submits that the District Court abused its discretion by holding your Petitioner in civil contempt, pursuant to Title 28 U.S.C. § 1826(a) when your Petitioner's refusal to testify was based upon the fact that the questions asked of him by the Government were based upon information obtained by the Government during the illegal interception and monitoring of your Petitioner's phone conversations in violation of Petitioner's Fourth Amendment privacy rights.

In any event, whether the government violated the constitutional and statutory rights of a person who speaks into a protected wire or cellular telephone with a person who, unbeknownst to him, is

using a cordless telephone, is a question of first impression in this Honorable Court and Petitioner would have lost his ability to litigate this important issue had he complied with the District Court's order.

CONCLUSION

In conclusion, your Petitioner prays that this Honorable Court recognize that your Petitioner's Fourth Amendment right to privacy was violated by the government's interception and recording of his telephone conversations with Robin L. Brumbaugh, who unbeknownst to your Petitioner, was utilizing a cordless telephone that was being monitored by the United States Government without a wiretap order. Petitioner further prays that this Honorable Court overturn the

District Court's adjudication as well as the Circuit Court's subsequent approval thereof that your Petitioner was in civil contempt, pursuant to Title 28, U.S.C., Section 1826(a).

Respectfully submitted,

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEVEN M. ASKIN,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITON FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

A. In Re Askin, 47 F.3d 100 (4th Cir. 1995)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: STEVEN M. ASKIN,
Appellant,

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARK T. MCNULTY,
Defendant.

No. 94-5428

Appeal from the United States District Court
for the Northern District of West Virginia, at Elkins.
Irene M. Keeley, District Judge.
(CR-94-8)

Argued: December 6, 1994

Decided: February 2, 1995

Before WILKINSON, Circuit Judge, PHILLIPS, Senior Circuit Judge, and LAY, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Senior Judge Phillips and Senior Judge Lay joined.

COUNSEL

ARGUED: William Benjamin Moffitt, MOFFITT, ZWERLING & KEMLER, Alexandria, Virginia; Kevin David Mills, BURKE

STREET LAW CENTER, Martinsburg, West Virginia, for Appellant. Thomas Oliver Mucklow, Assistant United States Attorney, Wheeling, West Virginia, for Appellee. **ON BRIEF:** William D. Wilmoth, United States Attorney, Wheeling, West Virginia, for Appellee.

OPINION

WILKINSON, Circuit Judge:

This case raises questions about the respective roles of Congress and the courts in judging the propriety of surveillance activity involving advancing technologies. Appellant Steven M. Askin, a non-party witness in a drug conspiracy trial, refused to answer certain questions posed to him by the government on the ground that the questions were based on information obtained by electronic surveillance in violation of the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. § 2510-2521 (1988). The district court cited Askin for civil contempt, from which he now appeals. Mindful of the fact that Title III represents a comprehensive effort by Congress to strike a careful balance between rights of personal privacy and the needs of law enforcement, and reluctant to employ constitutional concepts to overturn that balance, we hold that the surveillance in this case was lawful. Askin therefore lacked just cause to refuse to testify, and we affirm the judgment of the district court holding him in contempt.

I.

In early January of 1994, a West Virginia grand jury indicted several individuals on multiple drug-related offenses, including conspiracy to distribute cocaine. As part of its pre-indictment investigation, the government monitored telephone conversations between appellant Askin and Robin L. Brumbaugh, who was among those named in the indictment as a co-conspirator.

The calls were conducted by Askin on either a traditional land-based telephone or a cellular car phone, while Brumbaugh spoke on

a cordless phone. Cordless telephone communications are transmitted between the cordless phone handset and its base unit by AM or FM radio signals. These signals can be intercepted with relative ease by standard AM radios. Government agents, without prior judicial authorization, used a radio scanner to intercept and record the radio waves emitted from Brumbaugh's cordless phone.

Askin, who is an attorney, was originally involved in this case as defense counsel to Brumbaugh and another defendant, Paul E. Frazier. When it became clear that the government intended to call Askin as a trial witness on its behalf, the magistrate judge granted the government's motion to disqualify him as defense counsel in the case. The government then issued a subpoena to Askin on April 6, 1994.

Following issuance of the subpoena, Askin filed two pre-trial motions: a motion to suppress the intercepted material and a motion to quash the subpoena. The suppression motion argued, *inter alia*, that use of the intercepted material would violate Askin's rights under Title III and the Fourth Amendment. Askin's motion to quash argued that the subpoena violated the attorney-client privilege and the Sixth Amendment. The district court denied both motions.

The case then proceeded to trial. The government called Askin, who had been granted use immunity for his testimony, as a witness in its case-in-chief. In an *in camera* hearing, the prosecutor asked Askin several introductory questions regarding his name and employment, which Askin answered. Askin refused, however, to answer the prosecutor's next question referring to one of the defendants: "Do you know a Mark McNulty?" Askin maintained that the question was based on conversations between him and Brumbaugh that the government had intercepted in violation of the Fourth Amendment.

The district judge reminded Askin that he was testifying under a grant of immunity, informed him that she had previously rejected his Fourth Amendment argument, and ordered him to respond. Askin again resisted the first question. He then refused to answer the following questions, which he also believed were derived from the intercepted conversations: "Do you know Robin L. Brumbaugh?," "Do you know Mark Dabbs?" (another defendant), "Have you used cocaine?," "Have you ever received cocaine, either by purchase or gift

or in any other way, cocaine from Mark McNulty?" The court subsequently held Askin in civil contempt pursuant to 28 U.S.C. § 1826(a) (1988). Askin now appeals.[1]

II.

Title 28 of the United States Code grants district courts the power to order the confinement of witnesses who refuse to comply with court orders to testify. It provides that:

> Whenever a witness in any proceeding before . . . any court . . . of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court, upon such refusal . . . may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony. . . .

28 U.S.C. § 1826(a). The statute plainly affords recalcitrant witnesses a "just cause" defense to civil contempt charges. In *Gelbard v. United States*, 408 U.S. 41 (1972), the Supreme Court held that a showing by a witness that his interrogation was based on illegal government surveillance is sufficient to constitute just cause for refusing to testify. *Id.* at 46-52. Thus, where a witness demonstrates that questions derive from unlawfully intercepted communications to which he was a party, such demonstration precludes an adjudication of contempt under § 1826(a). *Id.*

In challenging the validity of his contempt citation, Askin contends that he had just cause to refuse to testify because the questions propounded to him were the fruit of telephone conversations monitored in violation of both Title III and the Fourth Amendment. We shall address the statutory and constitutional claims in turn.

[1]The appeal of the civil contempt citation is not mooted by the conclusion of the underlying trial. The disposition of contempt charges against Askin may affect his status as a member of the West Virginia Bar. Furthermore, Askin has recently been indicted on criminal contempt charges for his refusal to purge himself of the civil contempt citation.

A.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, forbids the warrantless interception of wire, oral, and electronic communications. 18 U.S.C. § 2511. If a particular conversation does not qualify as either a wire, oral, or electronic communication, it is not protected from interception by Title III. *United States v. Smith*, 978 F.2d 171, 175 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1620 (1993). We must first ask whether the Askin-Brumbaugh telephone conversations — transmitted and intercepted via radio wave from Brumbaugh's cordless telephone — fell within any of the statutory categories of protected communication at the time those conversations took place.

At the time of the conversations in question, the statute made plain that the radio component of cordless phone conversations was, by definition, neither a wire nor electronic communication. It defined wire communication as "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . *but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.*" 18 U.S.C. § 2510(1) (emphasis added). The statute similarly provided that electronic communication "means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system . . . *but does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.*" 18 U.S.C. § 2510(12)(A) (emphasis added). Congress has since extended Title III's coverage to include the radio portion of cordless communications by simply striking the above exceptions from §§ 2510(1) and 2510(12)(A). *See* Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 202(a), 108 Stat. 4279 (1994). At the time this case arose, however, §§ 2510(1) and 2510(12)(A) expressly excluded the radio portion of cordless communications from the definition of wire and electronic communication, and thus from the statutory ban on the warrantless interception thereof.

Nor did the cordless conversations fall within the meaning of "oral communication." That term includes "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). Virtually every court to have faced the question of whether cordless phone conversations were oral communications under § 2510(2) answered in the negative. *See Smith*, 978 F.2d at 175-76; *Tyler v. Berodt*, 877 F.2d 705, 706-07 (8th Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990); *United States v. Carr*, 805 F. Supp. 1266, 1271-72 (E.D.N.C. 1992); *Edwards v. Bardwell*, 632 F. Supp. 584, 589 (M.D. La. 1986). Moreover, Congress has always addressed the question of cordless telephone conversations as wire or electronic, not oral, communications. *See e.g.*, 18 U.S.C. §§ 2510(1), 2510(12)(A); Pub. L. No. 103-414, § 202(b), 108 Stat. 4279 (1994) (amending § 2511(4)(b) of Title III, which provides penalties for the interception of certain "wire or electronic communication," to include cordless telephone communications).

Thus the cordless telephone conversations between Askin and Brumbaugh were not protected by Title III at the time the surveillance in this case occurred. Askin, however, urges this court to take a bifurcated view of the communications at issue, focusing exclusively on his end of the conversations in determining the applicability of the statute. Notwithstanding the fact that Brumbaugh used an unprotected cordless phone, Askin argues that he himself used either a traditional wire-based or cellular telephone, which he states are protected instruments under Title III. Thus, he concludes, Title III's prohibition against warrantless interception applies in this case.

We are unpersuaded. At the outset, it is important to recognize that Title III was designed as a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard*, 408 U.S. at 46. The interception of wire, oral, and electronic communication, without prior judicial approval, is clearly prohibited by § 2511. Yet it was equally clear, as of the time of Askin's conversations, that §§ 2510(1) and 2510(12)(A) permitted the interception of cordless radio waves. It is undisputed that this case involved the interception of the radio component of cordless telephone transmissions by a radio scanning device. Both Brumbaugh's and Askin's words traveled over the radio waves between the base unit of her telephone and its handset; hers

traveled from the handset to the base, whereas his traveled from the base to the handset. Where, here, one party used a cordless phone and the radio waves broadcast from that instrument were intercepted, the statutory exceptions for "the radio portion" of cordless telephone communications "transmitted between" the handset and base applied to both sides of the conversation by the force of their unambiguous terms. *See also Carr*, 805 F. Supp. at 1268 n.3, 1269 (describing the fact that some cordless communications involved protected land-based telephones as a "distinction[ ] without a difference" because "unless the cordless telephone was in use, broadcasting radio waves from the base to the handset and back, the agents [using scanners] were unable to intercept the conversation").

The statute thus was plain: the exclusion of the radio portion of cordless transmissions from the protected categories of wire and electronic communication admitted of no exception. Title III, like all legislation, attempts to prescribe with sufficient clarity rules that permit individuals, including those in the business of law enforcement, to steer clear of illegality. Askin's argument, however, would strip the statute of its plain prescriptive quality and penalize persons for conduct whose character they could not have appreciated *ex ante*. To take account of the nature of other instruments in applying the exceptions for cordless radio waves in §§ 2510(1) and 2510(12)(A) would also be to append the following language at each provision's close: ". . . except when those radio portions are ultimately transmitted to, by radio wave or otherwise, or received by, any telephone instrument protected under this title." The amendment that Askin seeks — privacy protection for third parties to unprotected communications — may well be desirable as a matter of telecommunications policy, but it is one that this court is powerless to promulgate. We note that Congress, the proper repository of such authority, has only recently demonstrated its willingness to safeguard public privacy by amending Title III to protect both the radio and the wire portion of cordless communications. *See* Pub. L. No. 103-414, § 202, 108 Stat. 4279 (1994). The fact that Congress later covered the entirety of cordless telephone transmissions simply does not authorize a court to extend such coverage sooner. *See generally Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

B.

Askin further maintains that he had just cause to refuse to testify because the government's questions were based on information obtained in violation of the Fourth Amendment. Askin again presses a bifurcated view of his conversations with Brumbaugh, asserting that because he spoke on allegedly protected phones, his conversations were *ipso facto* shielded by the Fourth Amendment. Viewing the communications at issue in isolated segments is, however, as problematic in the context of the Fourth Amendment as it was in the context of Title III. We think a unitary view of an intercepted communication is more appropriate and thus conclude that the surveillance in this case violated no Fourth Amendment right.

As an initial matter, Askin's bifurcated perspective is troublesome in that it reflects a flawed conception of communication — a point that applies with equal force to his statutory argument. Contrary to appellant's suggestion, communication is by definition not a one-way street. "Communication" means "a process by which information is *exchanged between individuals* through a common system of symbols, signs, or behavior." Webster's Ninth New Collegiate Dictionary 266 (1984) (emphasis added). If it takes two to tango, it assuredly takes at least two to communicate. Generally, then, it makes little conceptual sense to treat conversations as a series of discrete and independent parts rather than as a unified whole. Moreover, in terms of the admissibility of intercepted communications, a bifurcated approach to the Fourth Amendment makes even less sense: one half of a conversation is not readily separable at trial from the other.

The Supreme Court's Fourth Amendment jurisprudence supports the view that a conversation should be seen in its entirety rather than in segments. In *United States v. White*, 401 U.S. 745 (1971), the Court allowed government agents to testify at trial to conversations between a defendant and a government informant that were monitored without a warrant. In reaching this conclusion, the Court rejected a view of the conversations which focused exclusively upon the defendant. *Id.* at 749-50. Rather, the Court considered the additional (and ultimately dispositive) fact that when the defendant made the statements in question, he shared them with another person — a person who happened to be an unreliable confidant. *Id.* at 749. The person to whom one is

speaking was deemed as critical for Fourth Amendment purposes as the person who speaks.

White underscored a second point pertinent to this appeal: that in the course of conversing with others, persons assume certain risks that may bear on the viability of any Fourth Amendment rights they subsequently assert.

> Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his.

Id. at 752; *see also Hoffa v. United States*, 385 U.S. 293, 302 (1966) (cautioning that "no interest legitimately protected by the Fourth Amendment is involved" where an individual risks reliance on his "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it"); *Lewis v. United States*, 385 U.S. 206 (1966).

To be sure, there are differences between an informant and a cordless phone user at the other end of a communication. There exists, however, a crucial similarity between them for purposes of determining the existence of valid Fourth Amendment interests. The common characteristic of the government informant and the cordless phone user is that they are both unreliable recipients of the communicated information: one because he repeats the conversation to law enforcement officers and the other because he broadcasts the conversation over radio waves to all within range who wish to overhear. It is this general risk of unreliability of which *White* and *Hoffa* warn, not the specific risk that the listener is an informant per se. *See Hoffa*, 385 U.S. at 302-03.

If it were true that the Fourth Amendment guaranteed parties using protected phones the right to be free from the warrantless interception of the cordless transmission on the other end of the line, then the blanket exceptions for the radio portions of such transmissions, which failed to provide for such a right, would contravene that guarantee.

Were we to hold that Askin's end of the cordless communications was constitutionally protected, we would be forced to rule the statutory exceptions of Title III unconstitutional. Our rejection of Askin's Fourth Amendment argument, however, has the advantage of avoiding this untoward result, in accord with the Supreme Court's admonition that a "heavy presumption of constitutionality" attaches to the "'carefully considered decision[s] of a coequal and representative branch of our Government.'" *Department of Labor v. Triplett*, 494 U.S. 715, 721 (1990).

The general presumption of constitutionality afforded to duly enacted legislation has heightened significance with regard to Title III. As the uses of technology become more intrusive, claims of personal privacy will grow in importance. As the methods of criminal enterprises become more sophisticated, the needs of law enforcement in combatting them will also grow. Difficult judgments and trade-offs will be inevitable, just as they were in the most recent piece of surveillance legislation. *See* 140 Cong. Rec. H10779 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks) (describing the Communications Assistance for Law Enforcement Act as "the result of extensive negotiations among law enforcement, Congress, industry and the privacy community"). In the fast-developing area of communications technology, courts should be cautious not to wield the amorphous "reasonable expectation of privacy" standard, *see Katz v. United States*, 389 U.S. 347, 351-52 (1967), in a manner that nullifies the balance between privacy rights and law enforcement needs struck by Congress in Title III. Decisionmaking in this area demands a comprehension of complex technologies. *See e.g.*, S. Rep. No. 541, 99th Cong., 2d Sess. 8-11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3562-65 (describing in great detail the new telecommunications and computer technologies regulated by the ECPA). Such understanding, however, requires precisely the type of expertise that courts are institutionally ill-equipped to acquire and to apply. As new technologies continue to appear in the marketplace and outpace existing surveillance law, the primary job of evaluating their impact on privacy rights and of updating the law must remain with the branch of government designed to make such policy choices, the legislature. Congress undertook in Title III to legislate comprehensively in this field and has shown no reluctance to revisit it. Accordingly, we must decline Askin's invitation to usher in through the Fourth Amendment a prohibition of that which

Title III tells us, in no uncertain terms, Congress affirmatively permitted at the time this case arose.[2]

III.

For the foregoing reasons, we hold that the surveillance activity in this case violated neither Title III nor the Fourth Amendment. Askin thus lacked just cause to refuse to testify under § 1826(a). The district court's judgment is

AFFIRMED.

[2]It is clear that under *Gelbard v. United States*, 408 U.S. 41 (1972), Askin has standing to raise the legality of the government's surveillance in challenging his contempt citation. Our conclusion that the government has not engaged in unlawful surveillance would necessarily defeat Askin's motion to suppress the contents of the intercepted conversations, as well as his contention that he had just cause to refuse to testify. In view of the lack of merit in his claims of illegality, we, like the district court, see no need to reach the problematic question of Askin's standing to raise a motion to suppress, which would be deemed meritless in any event for the reasons expressed in this opinion.

We also hold that the district court fully complied with 18 U.S.C. § 3504(a)(1), which requires that "upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act . . . the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act." The government affirmed from the outset of this litigation that it monitored the Askin-Brumbaugh calls, although it consistently maintained that there was nothing unlawful about that activity.

B. Constitutional Provisions, Statutes and Regulations

Fourth Amendment to the United States Constitution

> "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Title 18 U.S.C. Section 2510 (1) sets forth in pertinent part that:

> "wire communications" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception...but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit." [1986]

Title 18 U.S.C. Section 2510 (12) sets forth in pertinent part that:

"electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electric, or photo optical system that effects interstate or foreign commerce but does not include (A) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit" [1986]

Title 18 U.S.C. Section 2510 (1) sets forth in pertinent part that:

"wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications effecting interstate or foreign commerce in such term includes any electronic storage of such communication."
[1994]

Title 18 U.S.C. Section 2510 (12) sets forth in pertinent part that:

> "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electro magnetic, photo electric, or photo optical system that effects interstate or foreign commerce, but does not include (A) any wire or oral communication; (B) any communication made through a tone only paging device; or (C) any communication from a tracking device (as defined in Section 3117 of this Title).
> [1994]

Title 18 U.S.C. Section 2515 sets forth in pertinent part that:

> "whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Title 18 U.S.C. Section 2516 sets forth in pertinent part that:

> "(3) any attorney for the government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a federal Judge of competent jurisdiction for, and such Judge may grant, in conformity with Section 2518 under this title, an order authorizing or approving the interception of electronic communication by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of any federal felony."

Title 18 U.S.C. Section 2518(10)(a) sets forth in pertinent part that:

> "any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a state, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that (i) the communication was unlawfully intercepted."

Title 28 U.S.C. Section 1826(a) sets forth in pertinent part that:

> "whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information."